

Progressive Business Publications
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RE: CG Docket No. 02-278

Introduction

In response to the invitation of the Federal Communications Commission¹, Progressive Business Publications files these comments regarding the American Teleservices Association's pending petition for a declaratory ruling regarding certain provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code². Progressive Business Publications, a diversified information company, fully supports this petition. Progressive Business Publications urges the Commission to exercise its authority to preempt the state-law provisions at issue here to the extent that they are more restrictive than the Commission's own rules.

Factual Background

In July 2003, the Commission issued a final rule³ regarding implementation of the Telephone Consumer Protection Act of 1991 (TCPA)⁴. The final rule revised TCPA rules and adopted new ones. It also emphasized that the Commission does not intend to bar legitimate telemarketing practices,⁵ and it stressed the benefits of "a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations."⁶

In May 2004, the New Jersey Division of Consumer Affairs published rules implementing the New Jersey Consumer Fraud Act. Despite the Commission's clearly expressed intent to foster a uniform regulatory scheme, these rules placed more prohibitive restrictions on telemarketers than the restrictions that are set forth by the Commission's own rules. For example, the New Jersey rules incorporate the "established business relationship" exemption only to a limited extent. In addition, they fail to exempt telephone solicitations even when the telemarketer has a personal relationship with the subscriber. Further, the New Jersey rules purport to apply to interstate as well as intrastate calls.

New Jersey Lacks the Authority to Regulate Interstate Calls

As the Commission's final rule noted, the traditional paradigm has called for states to exercise jurisdiction only over intrastate calls, and for the Commission to

¹ Public Notice DA 04-3185, Released October 4, 2004.

² CG Docket No. 02-278.

³ Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144-44,179 (July 25, 2003).

⁴ 47 U.S.C. § 227.

⁵ *Id.* at 44,147.

⁶ *Id.* at 44,155.

exercise jurisdiction over interstate calls.⁷ The Commission's final rule further noted that Congress amended the TCPA to give the Commission jurisdiction over both interstate and intrastate calls.⁸ However, Congress did not similarly provide states with the authority to regulate interstate calls. Thus, to the extent that states are to exercise jurisdiction only over intrastate calls, Congress preserved the existing dichotomy that limits state jurisdiction to intrastate calls only.

The language of 47 U.S.C. § 227(e)(1) also compels the conclusion that Congress did not intend for states to exercise jurisdiction over interstate calls. This provision reads as follows:

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits –

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic dialing systems;
- (C) the use of artificial or prerecorded messages; or
- (D) the making of telephone solicitations.

A critical aspect of this provision is its explicit limitation of the preemption bar to intrastate requirements only. Although the Commission has commented that the provision is ambiguous as to whether the provision's alphabetically enumerated activities reference intrastate calls only⁹, it would make little sense to limit the broad, general restriction identified in the initial subsection solely to intrastate calls while permitting states to prohibit the narrow and specifically enumerated activities on an interstate basis.

The New Jersey Rules Frustrate the Objective of Creating Uniform Rules

Moreover, interpreting 47 U.S.C. § 227(e)(1) to permit states to regulate interstate calls would completely frustrate the clearly expressed legislative intent to avoid inconsistent interstate rules.

The final rule's discussion of the interplay between state and federal do-not-call regulations carries a prominent and overriding theme: There is a critical interest in promoting a uniform and consistent regulatory scheme. Importantly, the rule recognizes that the failure to achieve this goal would create "a substantial compliance burden" for telemarketers.¹⁰

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

The substantial significance of the interest in creating and maintaining a uniform regulatory scheme is reflected in the Commission's statement that, in its own view, "any state regulation of interstate telemarketing that differs from our rules *almost certainly* would conflict with and frustrate the federal scheme and *almost certainly* would be preempted."¹¹ (Emphases added.) In fact, the Commission's rule goes so far as to "caution that more restrictive state efforts to regulate interstate calling would almost certainly conflict with our rules."¹²

By issuing rules that impose more significant state-law restrictions than the federal rule sets forth, New Jersey regulators have in effect thrown this caution to the wind. In so doing, they have ignored the warning that such regulation would almost inevitably be preempted. More importantly, they have frustrated the clear intent of Congress to promote a general, uniform scheme that would spare telemarketers the impossible task of complying with a hodgepodge patchwork of inconsistent state-law requirements.

Conclusion

Progressive Business Publications respectfully urges the Commission to grant the American Teleservices Association's petition for declaratory ruling in CG Docket 02-278.

Sincerely,

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President
Progressive Business Publications

¹¹ *Id.*

¹² *Id.*